In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1383

McCORVEY SHEET METAL WORKS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. B1) is not reported. The decision and order of the National Labor Relations Board (Pet. App. D1-D2) is reported at 216 NLRB No. 146.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1975 (Pet. App. A1-A2). A timely petition for rehearing was denied on February 9, 1976 (see Pet. 2). The petition for a writ of certiorari was filed on March 29, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly found that substantial evidence on the whole record supports the

Board's factual finding that the company discharged an employee union steward because of his union activity, and not because of poor work performance.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*, are:

> Sec. 8. (a) [29 U.S.C. 158(a)] It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
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> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * * .

STATEMENT

McCorvey Sheet Metal Works, Inc. ("the Company"), is a sheet metal contractor with main offices in Houston, Texas. In early 1974 it began work on two construction projects in Galveston, Texas (Pet. App. C1-C2; Tr. 40),[1] one involving the construction of the new Child Health Center, and the other (directly across the street from the Child Health Center), involving demolition and installation work at the Borden Building (Pet. App. C2).

Sheet Metal Workers Local 54 represents sheet metal workers in the Houston area, where the Company is

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[1] "Tr." refers to the transcript of testimony before the Board.

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based, while Sheet Metal Workers Local 144 represents such workers in the Galveston area (Pet. App. C2). At the time work commenced at the Child Health Center, the Company, which operates as a union shop, named Charles Sawey, a member of Houston Local 54, as job foreman; Paul Simpkulet, another member of Houston Local 54, also was hired for the job (Pet. App. C3).[2] In addition, the Company hired Arthuro Torres, a member of Galveston Local 144, to work at the Child Health Center. Torres was appointed job steward by Local 144 business agent Bob Marshall (Pet. App. C3). Later, in April, the Company also hired Galveston Local 144 member T.A. Meadows to work at that job (Pet. App. C3; Tr. 7-9, 91).

The Company had no sheet metal worker employed exclusively at the Borden Building. Instead, Company President Raymond McCorvey worked out an arrangement with Union business agent Marshall whereby a member of the Child Health Center crew would be available to do whatever sheet metal work was necessary at the Borden Building (Pet. App. C4; Tr. 11, 121-125).[3] Employee Simpkulet was designated by President McCorvey, and, on occasion, he performed work at the Borden Building job (Pet. App. C4; Tr. 10, 93-94, 128-129).

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[2]The Company's hiring of two men from Houston Local 54 for the job was consistent with Galveston Local 144's rule that the Company be allowed to bring in no more than two workers from Houston for the Galveston jobs (Pet. App. C2).

[3]Under a jurisdictional agreement between the Plumbers and the Sheet Metal Workers Unions, the task of disconnecting and removing the ducts leading to air handling units, which contain evaporators and filter coils, is to be assigned to a sheet metal worker. After the ducts are disconnected and removed, the air handling units are to be removed by a composite crew of plumbers and sheet metal workers (Pet. App. C3-C4; Tr. 47-48, 121, 137-138, 141-142).

However, on several occasions in late April and early May, when the Borden Building plumbing contractor asked Foreman Sawey to send over a man to do some sheet metal work, Sawey refused because he felt the crew was too busy with its own work (Pet. App. C4-C5; Tr. 105-106). After the first such incident, shop steward Torres complained to Sawey that, if one of them was not sent over, the sheet metal work would be done by another craft. When Sawey refused on a second occasion, Torres, who had noticed a change in Sawey's attitude toward him after the first Borden work incident, notified Union business agent Marshall that another craft was doing sheet metal work at the Borden Building (Pet. App. C4-C5; Tr. 13-16). At Torres' request, Marshall came to the Child Health Center and met with Torres and Sawey (Pet. App. C5; Tr. 15-17). At the meeting, Torres told Sawey that he "didn't appreciate him giving our union work away to other crafts" (Tr. 17, 109). Although Sawey and Torres became angry at the meeting, Sawey at that time expressed no dissatisfaction with Torres' work (Tr. 17-21, 106-109).

On May 15, Sawey again refused the plumbing contractor's request that a sheet metal worker be sent over to the Borden Building. Torres offered to do this sheet metal work, but Sawey responded that he was not responsible for the Borden Building and would have nothing to do with it (Pet. App. C5; Tr. 21-22). Torres immediately called Marshall, who spoke with President McCorvey (Pet. App. C5; Tr. 23). Several days later a full time sheet metal worker was employed for the Borden job (Pet. App. C5; Tr. 23-24). About this time, Sawey asked Marshall to replace Torres with another worker (Pet. App. C5-C6; Tr. 24-25).

On May 23, Sawey left work early, telling Torres and Meadows to continue in the job they were doing

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(Pet. App. C6; Tr. 28-29). The next morning, Sawey accused Torres of having done little while he was away and of having taken a nap when he should have been working (Pet. App. C6; Tr. 29-30). When Torres replied that both he and Meadows had stayed busy during the afternoon, Sawey warned him to leave Meadows out of it because "[t]his is between me and you" (Pet. App. C6; Tr. 29-30). Sawey told Torres he was hired to work and to keep his mouth shut; Torres agreed, but explained that, as Union job steward, he had to question Sawey's practice of giving away sheet metal work (Pet. App. C6; Tr. 30). Sawey then called President McCorvey, received permission to fire Torres, and discharged him the next working day, May 28 (Pet. App. C6; Tr. 32-34, 97). No action of any kind was taken against employee Meadows (Pet. App. C7; Tr. 99-100).

The Board concluded upon the evidence in the record that Torres was discharged "because of his insistence that something be done about the sheet metal work at the Borden job," in violation of Section 8(a)(1) and (3) of the Act (Pet. App. C8). In so finding, the Board rejected the Company's assertion that Torres was discharged because of his allegedly inadequate work performance. The Administrative Law Judge, whose decision was adopted by the Board, explained (Pet. App. C7): "Both Sawey and McCorvey were vague and unspecific as to what it was about Torres' work that they found so unsatisfactory." The Law Judge also noted that "Sawey singled Torres out on May 24, for allegedly failing to work energetically the afternoon before, even though Meadows would have been equally at fault" (*ibid.*).

The Board ordered the Company, *inter alia*, to offer Torres reinstatement to his former job or a substantially equivalent position, with backpay (Pet. App. C10).

The court of appeals summarily enforced the Board's order (Pet. App. B1).

ARGUMENT

As petitioner admits (Pet. 2), the only question raised by the petition is whether substantial evidence on the whole record supports the Board's evidentiary finding that Torres was discharged for union activity, rather than for poor work. Such an issue does not warrant review by this Court, where, as here, the court of appeals has sustained the Board's finding. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

In any event, as shown above, the credited testimony amply supports the Board's finding. Petitioner's argument (Pet. 7-8) in essence is a challenge of the Law Judge's credibility determinations. But in this case the Law Judge necessarily had to resolve questions of credibility, and there is no showing that, in rejecting the Company's assertions, the Law Judge abused his authority to do so. Cf. *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404, 408; *National Labor Relations Board* v. *Pittsburgh* S.S. Co., 337 U.S. 656, 660.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1976.

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